Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1416

LARRY GLOVER CARTER,
Petitioner

v

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CARL ZIEMBA
Attorney for Petitioner
2000 Cadillac Tower
Detroit, Michigan 48226
(313) 962-0525

AMERICAN PRINTING COMPANY, 125 WEALTHY STREET, S.E.,
GRAND RAPIDS, MICHIGAN 49503 — PHONE GL 8-5326

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Larry Glover Carter, by his attorney, Carl Ziemba, respectfully petitions this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment of that Court entered in an Order dated December 28, 1978 and Order denying rehearing and rehearing *en banc* entered February 7, 1979 in No 78 5350.

ORDERS BELOW

The Court of Appeals did not issue an opinion. The Order of the Court affirming the order of the District Court denying petitioner's motion to vacate sentence under 28 USC §2255 was entered on December 28, 1978 and is unpublished. It is appended hereto as Appendix "A".

The Order of the Court of Appeals denying petitioner's petition for rehearing and rehearing *en banc* was entered on February 7, 1979. It is unpublished and is appended hereto as Appendix "B".

STATEMENT OF JURISDICTION

The Order of the Court of Appeals affirming the judgment of the District Court which denied petitioner's motion to vacate sentence was entered on December 28, 1978. Petitioner's petition for rehearing and for rehearing *en banc* was timely filed and it was denied by Order dated February 7, 1979.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'

Title 21 United States Code, Section 841(a)(1) provides in pertinent part as follows:

> '§841 (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or posses with intent to manufacture, distribute, or dispense, a controlled substance; . . .'

QUESTION PRESENTED

Whether under an indictment laid under 21 USC 842(a)(1) it was error of constitutional dimensions to charge petitioner with conspiracy to *sell* and distribute heroin and with attempting to *sell* and distribute heroin and for the trial court to charge the jury in terms of petitioner having been charged with conspiracy to *sell* or distribute heroin and with attempting to *sell* or distribute heroin where the evidence would support a finding of an agreement to sell heroin but where there was no evidence whatever of delivery or attempted delivery of heroin and the statute in question proscribed manufacture, distribution and dispensing of heroin but not the *sale* of heroin.

STATEMENT OF FACTS

Petitioner was charged in a five count indictment with the commission of the following offenses:

(1) conspiracy [with one Gregory Hall] 'to *sell* and distribute' heroin, contrary to 21 USC 841(a)(1) and 21 USC 846;

(2) unlawful attempt to '*sell* and distribute' heroin, contrary to 21 USC 846;

(3) use of a telephone for the unlawful 'sale and distribution' of heroin, contrary to 21 USC 843(b);

(4) unlawful carrying of a firearm in the commission of a felony, contrary to 18 USC 924(c)(2);

(5) being a convicted felon, receiving a firearm in commerce, contrary to 18 USC 1202(a)(1).

The case was tried to a jury.

Testimony adduced on trial from government witnesses tended to establish that an informer and an undercover policewoman sought out petitioner and asked to get an eighth of heroin from petitioner. The crucial events occured in the house of petitioner. The policewoman had been given $3,800 of government funds; the informer was wearing a concealed transmitting microphone. In the house, petitioner asked for and was given the $3,800 by the policewoman and petitioner said 'It's on the way'. Thereafter, some two hours passed; petitoner, Hall, the informer and the policewoman played many games of pool; at one point, petitioner told Hall to call 'that bitch' to see what was taking her so long; at another point, petitioner said 'if that bitch don't be here', they would all go to get it. At another point, while petitioner was in a bedroom with the policewoman, he pulled a gun and demanded to know 'what the real deal' was. A commotion ensued, the noises of which were heard by the federal agents who had been maintaining a surveillance around the house by means of the transmitted carried by the informer. The agents moved into the house believing that 'a rip' was occurring in the house and that 'our people' were in trouble. Petitioner and Hall were arrested. There was no testimony that a call was made to 'that bitch' by either petitioner of Hall.

Neither petitioner nor Hall testified on trial.

The jury returned verdicts of guilty against petitioner on all counts save the third—the use of a telephone for the unlawful sale and distribution of heroin.

The petitioner was sentenced to two concurrent 10-year sentences on the conspiracy charge and the attempt charge, and five years for carrying a firearm in the commission of a felony, and two years for possession of a firearm while a convicted felon, the last two sentences to run consecutively to the 10 year sentences.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit where his conviction was affirmed, *United States* v *Carter, et al* (No. 75-2215, April 28, 1976), and the United States Supreme Court denied certiorari, *United States* v *Carter, et al* (No. 75-1882, June 15, 1977).

Petitioner subsequently filed a motion in the District Court to vacate sentence under 28 USC 2255. This motion was denied, and petitioner appealed the denial to the United States Court of Appeals for the Sixth Circuit, and the denial was affirmed, Larry Glover *Carter* v *United States* (No. 78-5350, December 28, 1978).

Petitioner's motion for rehearing and for rehearing *en banc* was denied by Order. *Larry Glover Carter* v *United States* (No. 78-5350, February 7, 1979).

REASONS FOR GRANTING THE WRIT

IT DOES NOT COMPORT WITH DUE PROCESS TO CONVICT A PERSON OF AN ACT WHICH HAS NOT BEEN DECLARED A CRIME BY CONGRESS

The statute under which petitioner was charged and convicted and sentenced under the first two counts was *21 USC 841(a)(1)* which reads, in pertinent part, as follows:

> '§841(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

> '(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .'

It should be noted that the verb '*to sell*' is not used in the foregoing statute.

Under Count One of the indictment filed in this case, petitioner was charged with conspiracy '*to sell* and distribute approximately 1/8 of a kilogram of heroin'.

Under Count Two of the indictment filed in this case, it was charged that petitioner did 'unlawfully attempt *to sell* and distribute approximately 1/8 of a kilogram of heroin'.

The trial judge instructed the jury that under Count One petitioner was charged with conspiracy '*to sell* and distribute approximately one-eighth of a kilogram of heroin'.

The trial judge also instructed the jury as follows:

> 'The Defendant Larry Carter has been charged, as I have said, in Counts One, Two, Three and Four of the indictment and the defendant Gregory Hall has been charged in Counts One and Two of the indictment, which offenses are all related to the knowing, unlawful and intentional *sale or attempt to sell and/or distribute* heroin.'
>
> 'I charge you that if you find that the government has failed to prove beyond a reasonable doubt that the defendant Larry Carter or the defendant Gregory Hall had such a specific intent to unlawfully *sell or attempt to sell* heroin, then you cannot convict either or both of them of any of the offenses described in the counts of the indictment which apply to them. So much for Count One.'

It cannot be doubted that if petitioner had been charged in Count One simply with conspiracy to sell heroin and in

Count Two simply with an attempt to sell heroin, the two counts would have been fatally defective for failure to charge a crime since 'selling' or 'sale' of heroin is not proscribed by any federal statute.

And if the trial judge had instructed the jury that they could convict petitioner simply of conspiracy to sell heroin and simply of attempting to sell heroin, the instructions would have been fatally defective as empowering the jury to convict petitioner for an act or acts not declared to be crimes by an act of Congress.

This is so because in *United States* v *Hudson and Goodwin*, 7 Cranch 32,34 (1812), the Court said:

> 'The legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction of the offense.'

And in *Todd* v *United States*, 158 US 278, 282 (1895) the Court said:

> 'It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms.'

And in *United States* v *Berrigan*, 482 F2d 171, 186 (CA3 1973), the Court said:

> 'It cannot be overemphasized that conduct intended to be prohibited by federal law must be explicitly prohibited by statutory authority.'

Under former *21 USC §174*, the predecessor law to that under which petitioner was charged, one could be charged with '*selling*' heroin; 'selling' was the act which was proscribed and prohibited. *Adams* v *United States*, 220 F2d 297 (CA5 1955).

See also *United States* v *Redwood*, 492 F2d 216, 218 (CA3 1974), where the Court said:

> 'Appellant correctly observes that under prior law a person could not be convicted of "selling" narcotics if he were acting solely on behalf of the purchaser. (Citation omitted.) Under the present law, however, [21 U.S.C. §841(a)], the conduct proscribed is "distribution" rather than "sale" of a controlled substance.'

In *United States* v *Pierce*, 498 F2d 712, 713 (CADC 1974), the Court clearly recognized the distinction between 'sale' on the one hand, and 'distribution' on the other:

> 'As it pointed out, the charge in this case is not that appellant *sold*, but that he *distributed*, a controlled substance; and the new statute expressly defines "distribution" as meaning "to deliver". . . . The distinction between "sale", on the one hand, and "distribution," on the other, has been made even more pointed by Congress in the definition of the latter term contained in the successor statute, as other circuits have recently recognized.'

Congress had at one time, in the predecessor statute, declared the sale of heroin as a crime. The Congress could have declared the sale of heroin a crime in *21 USC §841(a)*. Congress did not do so. 'When Congress has the will it has no difficulty in expressing it- . . .'*Bell* v *United States*, 349 US 81, 83 (1955).

When construing the statute here in question, one should be 'struck by what Congress did not say'. *Rewis* v *United States*, 401 US 808, 811-812 (1971).

Congress did not say that selling a controlled substance was a crime: Congress said that manufacturing, distributing and dispensing and the possession with intent to manufacture, distribute and dispense a controlled substance was a

crime. Congress had formerly said that selling a controlled substance was a crime; Congress had the opportunity again to say that selling a controlled substance was a crime along with manufacture, distribution and dispensing and possession for these purposes of a controlled substance; but Congress did not say so.

In *Viereck* v *United States*, 318 US 236, 243 (1943) the Court said:

> 'The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem.'

One may manufacture or distribute or dispense a thing without selling it; one may sell a thing without manufacturing or distributing or dispensing it; one may sell a thing which is not even in existence, such as grain in a futures contract; one cannot manufacture or distribute or dispense a thing unless it is in existence.

The conclusion is difficult to escape that Congress was aware of the difficulties which law enforcement agencies and the courts had with the concept of 'sale' under former *21 USC §174* and decided in enacting *21 USC 841(a)* to omit 'sale' completely in the new statute and proscribe the manufacture and distribution and dispensing of controlled substances as the most effacacious means of ridding the social body of the physical presence of controlled substances in their undesired forms and uses.

Under the form of the indictment as laid and under the form of the jury charge as given, the jury might have found petitioner had conspired to sell heroin but not to distribute it; and the jury might have found that petitioner had attempted to sell heroin but not to distribute it. Hence, the jury might have convicted petitioner of a non-existence crime. Since the

verdicts on Count One and Count Two were general verdicts, it is not known whether the jury found that petitioner had conspired to sell heroin or to distribute it; and whether the jury found that petitioner had attempted to sell heroin or to distribute it. On one basis the verdicts would be valid; on the other basis, invalid. Hence, the two verdicts cannot stand. *Stromberg* v *California*, 283 US 359 (1931); *United States* v *Hudson*, 564 F2d 1377 (CA9 1977); *Gilbert* v *United States*, 370 US 650 (1962).

Hence, petitioner might have been convicted of a crime not known to the laws of the United States in violation of basic tenets of due process of law.

CONCLUSION

It is respectfully submitted that for the reasons given, the Order of the Court of Appeals for the Sixth Circuit affirming the Order of the United States District Court denying peitioner's motion to vacate sentence is in conflict with decisions of this Court and with the requirements of the Fifth Amendment to the United States Constitution such that plenary review should be granted in this Court and petitioner's request for a Writ of Certiorari should be granted.

Respectfully submitted,

CARL ZIEMBA
Attorney for Petitioner
2000 Cadillac Tower
Detroit, Michigan 48226
(313) 962-0525

Detroit, Michigan
[Date of printing]

APPENDIX

No. 78-5350

APPENDIX "A"

ORDER

No. 78-5350

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LARRY GLOVER CARTER,
Petitioner-Appellant

v.

UNITED STATES OF AMERICA,
Respondent-Appellee

Before: EDWARDS, ENGEL and MERRITT, Circuit Judges.

Defendant, pursuant to 28 U.S.C. § 2255, appeals the District Court's denial of his motion to vacate sentences imposed for convictions on several charges which resulted from an uncompleted drug transaction with an undercover narcotics agent. He was sentenced to two concurrent 10-year sentences for conspiring to distribute heroin (21 U.S.C. § 846) and attempting to distribute heroin (21 U.S.C. § 846), five years for carrying a firearm in the commission of a felony (18 U.S.C. § 924(c)(2)), and two years for possessing a firearm while a convicted felon (18 U.S.C. § 1202(a)). These last two sentences were to run consecutively to the 10-year sentence and to each other. This Court affirmed, *United States* v. *Carter, et al* (No. 75-2215, April 28, 1976) and the Supreme Court denied certiorari. *United States* v. *Carter, et al* (No. 75-1882, June 15, 1977).

No. 78-5350

On this appeal from the District Court's denial of his §2255 motion, defendant first asserts that he was improperly indicted and convicted for conspiring and attempting to *sell* as well as *distribute* heroin when the statute under which he was charged and convicted, 21 U.S.C. § 846, proscribes only conspiracy or attempt to *distribute* heroin. Defendant argues that the "sale," as such, of heroin is not statutorily proscribed and also argues that an individual can "sell" heroin without necessarily "distributing" it. We believe that under the statute "sale" is a sub-species of "distribution." The legislative history of the Comprehensive Drug Abuse Prevention & Control Act of 1970, 21 U.S.C. §§ 801, *et seq.* indicates that the statute is "extremely broad in scope, no longer restricted to the narrower concepts of buy and sell, but all inclusive in covering the entire field of narcotics and dangerous drugs in all phases of their manufacturing, processing, and distribution and use." *United States* v. *Pruitt*, 487 F.2d 1241, 1245 (8th Cir. 1973).

Defendant also claims he was deprived of his right to a fair trial by certain jury instructions. Allegations of instructional error are not appropriate in a § 2255 motion, *Osborn* v. *United States*, 415 F.2d 1021 (6th Cir. 1969) and, furthermore, the errors alleged do not assert fundamental errors of law that inherently result in a complete miscarriage of justice, *Davis* v. *United States*, 417 U.S. 333 (1974).

Finally, defendant's insistence that trial counsel rendered ineffective assistance must be rejected under the standard set forth in *Beasley* v. *United States*, 491 F.2d 687 (6th Cir. 1974).

Accordingly, it is ORDERED that the judgment of the District Court be, and hereby is, AFFIRMED.

ENTERED BY ORDER OF THE COURT

(s) John D. Helman
Clerk

No. 78-5350

APPENDIX "B"

ORDER

No. 78-5350

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LARRY GLOVER CARTER,
Petitioner-Appellant

v.

UNITED STATES OF AMERICA,
Respondent-Appellee

Before: EDWARDS, ENGEL and MERRITT, Circuit Judges.

No judge of the Court having moved for rehearing *en banc*, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

(s) John D. Helman
Clerk

ORDER

APPENDIX "C"

INDICTMENT

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY GLOVER CARTER,
GREGORY HALL,
Defendants.

CRIMINAL NO. 4-81704

VIO: Sections 846 & 843(b),
Title 21, U.S.C.;
Section 924(c)(2),
Title 18, U.S.C.;
Section 1202(a)(1),
Title 18 Appendix, U.S.C.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

That commencing on or about April 9, 1974, and continuing until on or about April 11, 1974, in the Eastern District of Michigan, Southern Division, LARRY GLOVER CARTER and GREGORY HALL, defendants herein, did knowingly

and unlawfully combine, conspire, and agree together to commit an offense against the United States of America, that is, *to* sell and distribute approximately 1/8 of a kilogram of heroin, a Schedule I Narcotic Drug Controlled Substance, contrary to the provisions of Section 841(a)(1), Title 21, United States Code; in violation of Section 846, Title 21, United States Code.

OVERT ACTS

The following overt acts were committed in furthering the conspiracy herein alleged:

1.) On April 9, 1974, GREGORY HALL, negotiated with an undercover police officer and a confidential informant of the Drug Enforcement Administration for the sale of 1/8 of a kilogram of heroin.

2.) On April 11, 1974, LARRY GLOVER CARTER, accepted $3,700.00 as payment for 1/8 of a kilogram of heroin which was to be delivered shortly all thereafter to an undercover police officer and a confidential informant of the Drug Enforcement Administration.

COUNT TWO

That on or about April 11, 1974, in the Eastern District of Michigan, Southern Division, LARRY GLOVER CARTER and GREGORY HALL, defendants herein did knowingly, wilfully, and unlawfully attempt to sell and distribute approximately 1/8 of a kilogram of heroin, a Schedule I Narcotic Drug Controlled Substance; in violation of Section 846, Title 21, United States Code.

COUNT THREE

That on or about April 10, 1974, in the Eastern District of Michigan, Southern Division, LARRY GLOVER CARTER, defendant herein, did knowingly and intentionally use a communication facility to wit, a telephone, for the purpose

of facilitating an unlawful sale and distribution of heroin contrary to the provisions of Section 841(a)(1), Title 21, United States Code, and for the purpose of furthering a conspiracy to sell and distribute heroin, contrary to the provisions of Section 846, Title 21, United States Code; in violation of Section 843(b), Title 21, United States Code.

COUNT FOUR

That on or about April 11, 1974, in the Eastern District of Michigan, Southern Division, LARRY GLOVER CARTER, defendant herein, did knowingly, wilfully, and unlawfully carry a firearm, that is, a Ruger, .44 caliber revolver, Serial *No. 8140,* during the commission of a felony, that is, the offenses of conspiracy to sell and distribute heroin and the attempted sale and distribution of heroin set forth in Counts I and II of this Indictment, which are felonies which may be prosecuted in a Court of the United States of America; in violation of Section 924(c)(2), Title 18, United States Code.

COUNT FIVE

That on or about April 11, 1974, at Detroit, in the Eastern District of Michigan, Southern Division, LARRY GLOVER CARTER, defendant herein, having been convicted on the 28th day of November, 1972, by the Recorder's Court for the City of Detroit, State of Michigan, of the offense of attempt to carry a pistol in a motor vehicle, a felony, did knowingly receive, possess, and transport in commerce and affecting commerce, a firearm, that is, a Ruger .44 caliber revolver, Serial No. 8140; in violation of Section 1202(a)(1).